## UNITED COMMERCIAL BANK v. YAP CHENG HAI & ORS.

**[O.C.J. (Sinnathuray J.) August 23, 1979]**
**[Singapore — Civil Suit No. 2499 of 1978]**

*Practice and Procedure — Res judicata — Applicability of, in Order 14 hearing in which leave to defend was granted — R.S.C. 1970, O. 14.*

The plaintiffs in this case claimed against the defendants on a document which they alleged was either an indemnity given by the defendants to the plaintiffs or alternatively that the document was a guarantee. In an earlier action, the plaintiffs had claimed against the defendants on the same document but solely on the ground that the document was a guarantee. In that action only the second defendant had been served with the proceedings. The plaintiffs then took out an Order 14 application for summary judgment against him. Leave to defend was granted. The next event in that action was that the plaintiffs discontinued it and brought the present action in which the claim was in the alternative against the defendants.

The issue before the court was whether the plea of *res judicata did apply.*

**Held:** for *res judicata* or estoppel by record to arise, putting the matter broadly, there must be a judgment on the issues that are before the court, and an order giving leave to defend is not a judgment. It is a decision that there should not be judgment for the plaintiffs.

*Cases referred to:-*

(1) *Henderson* v. *Henderson* 67 E.R. 319.

(2) *Government of Malaysia* v. *Dato Chong Kok Lim* [1973] 2 M.L.J. 74.

(3) *Wee Bing Po* v. *Dayang Anak Ngipa* [1974] 2 M.L.J. 56.

CIVIL SUIT.

*Miss Susan Jacob* for the plaintiffs.

*P. Suppiah* for the defendants.

**Sinnathuray J.** (delivering oral judgment): In this appeal the Registrar granted leave to defend in an Order 14 hearing. It is common ground that leave to defend was granted on a question of law that, on the facts of the case, *res judicata* applied. It is therefore necessary to refer to the facts to see whether the plea of *res judicata* does in fact apply.

The plaintiffs, the United Commercial Bank, claim against the defendants on a document which they say is either an indemnity given by the defendants to the plaintiffs or alternatively that the document is a guarantee.

The plaintiffs had in an earlier action, in Suit No. 462 of 1978, claimed againt the defendants on the same document but solely on the ground that the document was a guarantee. In that action only the second defendant had been served with the proceedings. The plaintiffs then took out an Order 14 application for summary judgment against him. Leave to defend was granted. The next event in that action was that the plaintiffs discontinued it and brought the present action, in which, as I have said, the claim is in the alternative against the defendants.

At the hearing before the Registrar, for the defendants, reliance was had on a *dicta* of Wigram V.C. in *Henderson* v. *Henderson.*[1]

"I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

As general principles of law, I accept what I have just quoted. But what is not before me are the facts which gave rise to the *dicta.* Again for the defendants I have been referred to the *Government of Malaysia* v. *Dato Chong Kok Lim,*[2] in particular to a paragraph of the judgment which states "The Privy Council, however, held in the case of *Ram Kirpal* v. *Rup Kuari* that upon general principles of law an interlocutory judgment in a suit was binding upon the parties in every proceeding in that suit". Again I have not been told the facts on which the Privy Council made the pronouncement.

As I view it, the principle that emerges from the two passages I have referred to is this: that *res judicata* applies where there has been an adjudication which results in a judgment that binds the parties. It is in this context that I asked counsel for the defendants whether leave to defend an action is a judgment.

It is submitted for the defendants that it was open to the plaintiffs, who had been the plaintiffs in the earlier action, if they were dissatisfied with the then learned Registrar's decision to have appealed against that decision. It is submitted that otherwise there will be no end to the proceedings. But as is submitted for the plaintiffs, it is open to a court to look into, in particular, the pleadings of the earlier action to see whether the present claim is in fact *res judicata* (see *Wee Bing Po* v. *Dayang Anak Ngipa*[3]). I accept that submission.

Now it is said there is another submission for the defendants which was not raised before the learned Registrar and that is that estoppel by record applies. I fail to see that it is another submission. *Res judicata* is a plea which is estoppel by matter of record.

In my view, for *res judicata* or estoppel by record to arise, putting the matter broadly, there must be a judgment on the issues that are before the court, and an order giving leave to defend is not a judgment. It is a decision. Indeed, it is a decision that there should not be judgment for the plaintiffs.

It only remains for me to say that since the learned Registrar made his decision on the narrow issue that *res judicata* applied, which on appeal I hold does not, the proper course for me is to refer this matter back to the Registrar for him to consider whether on the facts and law there are triable issues. If there are, leave to defend will be given. If not, there will be judgment for the plaintiffs. Costs reserved for decision on Order 14 application.

*Order accordingly.*

Solicitors: *Drew & Napier; P. Suppiah & Co.*